Supreme Court, U. S.
FILED
JAN 3 1979
MICHAEL RODAK, JR., CLERK

No. 78-764

Supreme Court of the United States

OCTOBER TERM, 1978

NORTHERN CALIFORNIA SUPERMARKETS, INC.,

Petitioner,

vs.

CENTRAL CALIFORNIA LETTUCE PRODUCERS COOPERATIVE, et al.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITIONER'S REPLY BRIEF

J. MICHAEL HENNIGAN

BRETZ AND HENNIGAN
124 Lasky Drive
Beverly Hills, CA 90212
Attorneys for Petitioner

INDEX

Page

Petitioner's Reply Brief 1
Conclusion 7

CITATIONS

CASES:

National Broiler Marketing Association v. United States, ... U.S. ..... (1978) 6
United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) 5

STATUTES AND REGULATIONS:

Capper-Volstead Act, 42 Stat. 388, 7 U.S.C. § 291 6
FED. R. CIV. P. 30(b)(6) 2

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-764

NORTHERN CALIFORNIA SUPERMARKETS, INC.

Petitioner,

vs.

CENTRAL CALIFORNIA LETTUCE PRODUCERS COOPERATIVE, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

In Petitioner's characterization of the case, we stated that the defendant Cooperative "performs no significant marketing, processing or handling functions as an entity . . ." and that "the only material function of the organization is to fix, set and stabilize the price at which its members individually sell their products" (Petition, p. 2).

Respondents have suggested that the record below shows marketing activity in addition to the setting of prices. We don't disagree. We never suggested that price fixing was the only activity performed by the Cooperative. We did suggest that on this record the District Court was forced to assume that no "significant, or material activity was performed by the Cooperative other than price fixing." (Petition, at P. 5).

However, Respondents have attempted to create the illusion of substantiality for those supplemental activities. In that effort, they looked principally to "Central's purpose" (as set forth in its Articles of Incorporation), and to the fact that in May of 1973, the members of the Cooperative agreed in a "cooperative marketing agreement" to engage in a series of activities other than price fixing.

The record below contains references to the deposition of Paul Fleming, designated by the Cooperative to speak on its behalf pursuant to Federal Rule of Civil Procedure 30(b)(6) (e.g., Transcript — pp. 5-7; 30). The deposition was taken on April 24, 1975, at which time Mr. Fleming was asked questions concerning the list of purposes set forth in the corporate articles. Counsel for Petitioner asked the questions:

> "Q. I am referring now to page one of the articles, paragraph A in the middle of the page, entitled the purpose, the purposes for which the Cooperative was formed are to engage in any activity in the convention of production, marketing, selling of or with the harvesting, growing, processing, canning, packing, grading and storing, handling, shipping or utilization of those products or the manufacturing of by-products from them, or in connection with the manufacturing, selling, or supplying of machinery,

equipment or supplies to its members or in financing the activities enumerated above or in any combination of the activities specified in this article. Did I read that correctly?

"A. Very good.

"Q. Backing through it, then, to your knowledge, has the Cooperative ever been engaged in financing the activities of members?

"A. No.

"Q. Has it been involved in the manufacturing, selling or supplying of machinery, equipment or supplies to its members?

"A. No.

"Q. Has it been involved in manufacturing by-products?

"A. No.

"Q. Has it been involved in harvesting any of the products of its members?

"A. No.

"Q. Preserving the products of its members?

"A. No.

"Q. Drying, processing, canning, packing, crating, storing, handling, shipping or utilizing products of its members?

"A. Not in the effect of establishing marketing policies for the handling and shipping. I would say the members were cooperating — I mean the Co-op is a — the members — and the Co-op dictates the policy by which the materials are going to be handled in shipping.

"Q. But is the Cooperative itself acting as a cooperative handling the products of its members?

"A. No.

"Q. Or shipping?

"A. No.

"Q. Or utilizing the products of its members?

"A. No.

"Q. Or any of the other things that I just read?

"A. No.

"Q. Okay. Does the Co-op acting as the Co-op, engage in the sale of any farm products of its members?

"A. No.

"Q. Does the Co-op, acting as a Co-op, engage in the production of the products of its members?

"A. No.

"Q. Okay.

"A. That just leaves marketing.

"Q. That just leaves marketing. Does the Co-op, acting as a Co-op, engage in any marketing?

"A. Yes.

"Q. What are those functions?

"A. Okay. Basically, setting up advance prices for chain stores and trying to stabilize the price and to prevent the wide fluctuations as we have mentioned before." (Depo. of Paul Fleming, pp. 38-39).

As Mr. Fleming indicated, what the members agreed to do was quite different from what they did once the Cooperative was formed. The activities which were performed were similar to those dealt with in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Here, rail cars selling at distressed prices had a depressing effect on the overall market for lettuce. In *Socony-Vacuum Oil,* spot prices for oil tank cars was the perceived evil which artificially depressed industry prices. In *Socony-Vacuum Oil,* the plan to raise the price of oil involved primarily the elimination of distressed oil from the market through a program of coordinated purchases. The defendants in that case argued their efforts tended only to stabilize a depressed market, and that once stabilization had occurred, competition dictated the price of oil. The Court struck down the "market stabilization" as a *per se* violation of the antitrust laws:

> "Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference." Id. at 221.

This is not a difficult factual record. Petitioner does not dispute that which everyone knows. In order to fix prices some discussion of market conditions is inevitable. We assumed in the District Court, in the Court of Appeals, and before this Court that some discussion of market conditions occurred at these meetings to fix prices. It was our position in the District Court, and it is our position here, that the record is silent as to any inference that those discussions were anything other than incidental to the

price fixing discussions. The defendants do not dispute that characterization, and the District Court relied on it when it found:

> "Plaintiff and defendants agree the primary activity of Central is to set prices or price ranges to which members are required to adhere in the sale of their lettuce." (Petition, at p. 6a).

Respondents have also argued that our *National Broiler Marketing* argument is misplaced because it was not raised in the Courts below. Obviously, the precise terms of the argument could not have been raised before this Court's decision. However, the fact that this Cooperative was not formed from the types of small farmers which congress envisioned in passing the Capper-Volstead Act was argued before both the District Court and the Ninth Circuit.

The size and vertically integrated nature of the members of the cooperative form part of the undisputed record in this case. (Record Vol. 2, p. 239 *et seq.)* The size of companies such as United Brands may be judicially noticed, and the amount of commerce handled by these Defendants was noted in the opinion below. (Petition, p. 6a).

Consequently, the record below is perfect for the questions originally presented. Defendants' price fixing is neither ancillary to nor a necessary incident of any legitimate collective activity. Defendants do not argue that it is. However, they insist upon immunity from the operation of the Sherman Act. We have demonstrated that no decisional precedent exists for the District Court opinion and no support can be found anywhere in the history of the statutory exemptions.

Both the statutory history of the agricultural exemption and the interpretative cases support the thesis

that price fixing will only be tolerated under circumstances in which it is ancillary to and a necessary incident of an otherwise legitimate collective activity, such as the collective sale of produce. To hold otherwise would be to disembowel the concept of a limited exemption for agriculture and would place this country at the whim of dominant groups of large agricorporations.

This is no group of small farmers. This group controls a significant proportion of the nation's lettuce supply. No effort has been made to disguise their price fixing; Defendants boldly assert that they are entitled to it.

If Defendants' activities ultimately receive sanction, the prospects are terrifying. The formation of large cooperatives which serve no serious function other than to manipulate the price of our food supplies would threaten our basic economic structure, just as it is now threatened by the cooperative actions of OPEC.

Although Defendants may dispute the cause of the price rise, the Federal and State Marketing News Service reported that in the year following the formation of the Defendant cooperative, the price of Salinas Valley lettuce rose by more than 50 percent at the producer level. The prospects of similar price rises in other commodities must be recognized as the probable progeny of the Ninth Circuit decision.

CONCLUSION

The Petition should be granted.

January 3, 1979.

Respectfully submitted,

J. MICHAEL HENNIGAN
BRETZ AND HENNIGAN
Attorneys for Petitioners